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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

MAY 19 2003

File: WAC 01 051 54827 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its president. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on the ground that the proffered position is not in an executive or managerial capacity.

On appeal, counsel submits a brief and the petitioner submits additional evidence. Counsel states, in part, that the beneficiary is performing executive and managerial duties and is not working in the capacity of a first-line supervisor.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), states, in pertinent part:

- (1) Priority Workers. - - Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. - - An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of Fair Gordon Communications of Canada; (2) engages in tourism marketing and public relations, with particular emphasis on promoting Canadian destinations to persons living in the United States; and (3) employs three to 11 persons, including the beneficiary, who is currently occupying the proffered position as a nonimmigrant intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at a salary of \$45,000 per year.

The issue to be discussed is whether the proffered position of president is in an executive or managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

At the time of filing the petition with the California Service Center on December 3, 2001, the petitioner described the job of president as:

- Implement the Quebec contracts for the Western U.S.;
- Create public relations strategies to promote U.S. tourism to Canada, Quebec and to other locations;
- Select travel media representatives from the Western U.S. to visit Quebec and write about it;
- Plan market and contract with U.S. tour packagers of conventions to hold meetings in Quebec City and in Montreal;
- Hire a U.S. communications firm to assist [the petitioner];
- Set financial goals and budgets;
- Manage staff and train [staff]; [and]
- Direct and coordinate business affairs through the manager of [the petitioner] who in turn directs staff.

On the I-140 petition, the petitioner stated that it employed four individuals. In an accompanying organizational chart, however, the petitioner listed only three employees, who were the president, the corporate secretary/director, and the manager. The organizational chart also contained six boxes, each of which contained the term "1099." Although the Administrative Appeals Office acknowledges that "1099" employees may be contract employees, none of the boxes contained a name of a person or a title of a position.

The director did not find the petitioner's description of its staffing levels and the beneficiary's job duties sufficient to determine whether the beneficiary would be employed in a managerial or executive capacity. Therefore, on February 26, 2002, the director requested additional evidence from the petitioner, to include:

- U.S. Business Organizational Chart: Submit a copy of the U.S. company's line and block organizational chart

describing its managerial hierarchy and staffing levels. The chart should include the current name of all executives, managers, supervisors and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties, educational level, annual salaries/wages . . . and immigration status . . . for all employees under the beneficiary's supervision. Finally, explain the source of remuneration of all employees and explain if the employees are on salary, wage, or paid by commission. (Emphasis in original.)

- Duties in the U.S.: Submit a more detailed description of the beneficiary's duties in the United States. Be specific. Also, indicate [an approximate] percentage of time spent in each of the listed duties.
- Form DE-6, Quarterly Wage Report: Submit copies of the U.S. company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.

In response, the petitioner submitted an organizational chart, which showed that it employed 11 persons, who were one president, one corporate secretary/director, two directors, one manager, and six "1099" employees. The "1099" employees were only listed by name, not job title. The beneficiary, as the company's president, indicated that the organizational chart included independent contractors whom the petitioner employs on an "as needed" basis as projects arise. The beneficiary also stated that the petitioner's only full-time employee, the manager, is responsible for accounts payable, receivables, and bookkeeping, and works with and supervises the with public relations professionals and journalists, who are employed on a contractual basis.

Regarding a more detailed description of the beneficiary's job responsibilities, the beneficiary, as the president, stated, in part,:

I am responsible for the development of new business clients for the corporation. While in the past, I spent 75 percent of my time working with Quebec Tourism on all its promotion projects, I currently spend a full fifty percent of my time both developing and servicing all the public relations clients that we now have.

In addition, I am taking the national, weekly radio show to a higher level of syndication. Almost forty percent of my time is spent developing a project we call "Destination Marketing Radio."

I develop Television opportunities for our clients. . . . I have traveled a great deal on business. . . working on travel trade shows. . . . I am involved in developing clients for Travel Related Marketing - ten percent of my time. . . . As CEO, I am responsible for the signing of all contracts and financial commitments by [the petitioner], all the varied legal aspects of operating a corporation, all reporting of income to the IRS and responsible for all arrangements for financing and payments on behalf of [the petitioner]. Overall, I am responsible for the maintenance and growth of the firm.

The director denied the petition on the basis that the proffered position was not in an executive or managerial capacity. The director noted the discrepancies between the two organizational charts regarding the number of individuals employed by the petitioner, and concluded that the beneficiary was only supervising one or two full-time employees, not 11 employees as claimed in the second organizational chart. In addition, noting the absence of support personnel, the director stated that the beneficiary performed support activities and did not manage a function.

On appeal, counsel states that the second organizational chart, which showed that the petitioner employed 11 persons, was submitted to show the relationship between the petitioner and all of its employees, which include both full-time employees on the company payroll and outside contractors. Regarding the beneficiary's role with the petitioner, counsel states that the beneficiary performs managerial and executive duties because she establishes goals, and plans and directs the implementation of marketing plans.

The beneficiary also submits a statement and additional evidence on appeal. The beneficiary asserts that her role within the petitioner is critical and essential because she is the director of new business development. The beneficiary further states that for each client, she establishes goals that will be attained, as well as marketing plans and plans of operation. Regarding the petitioner's employees, the beneficiary states that she relies upon contractual employees to provide the services of her business, who include journalists, marketing professionals, and an operations manager. The petitioner also submits the resumes of some of the contracted employees, a list of the petitioner's major activities during the 2000 and 2001 fiscal years, and a business plan.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(C), requires the Bureau to consider the reasonable needs of the organization in

light of its overall purpose and stage of development. The duties of the proffered position, rather than the size of the petitioner, must be the critical factor. See Sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B).

In a May 15, 2002 letter to the director, in which she described her job as president, the beneficiary stated: "I currently spend a full fifty percent of my time both developing and servicing all the public relations clients that we now have. . . . Almost forty percent of my time is spent developing a project we call 'Destination Marketing Radio.'" The beneficiary's own statements reveal that 90 percent of her time as president is spent performing tasks such as developing new business and servicing clients, which enable to the petitioner to provide its services to clients. Although the beneficiary may also establish policies and hire contractual employees, these duties are ancillary to her primary job responsibilities, which are to directly provide the petitioner's services to clients. As such, the proffered position is not in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). The evidence fails to establish the beneficiary primarily performs the high level responsibilities specified in the definition of managerial or executive capacity. Accordingly, the director's decision shall not be disturbed.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Canadian entity. The petitioner claims that it is a wholly-owned subsidiary of the Canadian entity. The petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if it is owned in any part by a foreign corporation. Accordingly, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). As the appeal will be dismissed on the ground discussed, this issue will not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.